Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

AL BAKER LIVINGSTON, JR.,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

CAN AN ACT OF MONEY SPENDING, WITHOUT CONCEALING OR DISGUISING THE SOURCE OF MONEY, VIOLATE 18 U.S.C. § 1956(a)(3)(B), THE MONEY LAUNDERING STATUTE?

LIST OF PARTIES

The parties to the proceedings in the lower tribunal are:

Al Baker Livingston, Jr.

United States of America

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Al Baker Livingston, Jr. requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, which affirmed his money laundering and conspiracy convictions.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is unpublished, but is reproduced in the Appendix.

JURISDICTION

On February 24, 1999, the United States Court of Appeals for the Eleventh Circuit issued its opinion affirming petitioner's money laundering and conspiracy convictions, and vacating his sentence with instructions to conduct a new sentencing hearing. The appellate mandate issued on March 25, 1999. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 13.1. The appellate court had jurisdiction pursuant to 28 U.S.C. § 1291.

PROVISIONS OF LAW

U.S. Constitution, Fifth Amendment.

No persons shall . . . be deprived of life, liberty, or property without due process of law . . .

STATEMENT OF THE CASE

Petitioner Al Baker Livingston, Jr. ("Baker") was convicted of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h), and money laundering, in violation of 18 U.S.C. § 1956(a)(3)(B). The events which led to petitioner's convictions began through a government initiated sting. Using a corrupt Miami lawyer named George Allen, the government set out to involve petitioner in money laundering transactions arising out of the sale of a Ft. Lauderdale restaurant, Baccarat Nightclub and Restaurant, partly owned by petitioner.

George Allen, the corrupt lawyer, began cooperating with law enforcement officers after having been caught laundering drug money for his clients. He introduced the government to a number of clients and potential clients. One of those government referrals involved petitioner, who had been contacted by the informant and asked if he was interested in selling his restaurant business to clients of the informant. The informant's clients wanted to purchase the business to launder illegal cash.

Because petitioner felt it necessary to conceal his acts from his business partner, a plan was devised to first buy out the partner's interest and then to proceed with the money laundering venture. As a first step, the informant

gave petitioner $100,000. In turn, petitioner gave the informant two $50,000 post-dated checks drawn on the restaurant's account, made payable to the lawyer's supposed clients' business: Amerivest. Petitioner instructed the informant to hold the checks until he could make arrangements to cover the funds.

Petitioner did not cover the checks. Instead, petitioner took $50,000 of the cash the informant gave him to a third party, who then issued petitioner a check in exchange for the cash. Petitioner deposited this $50,000 check in his personal account.[1] Petitioner repeatedly told the informant not to deposit the restaurant checks. Petitioner finally replaced one of those checks with a check drawn on his personal account made payable to a trust fund maintained by the lawyer-informant, as trustee for his clients. The check bore a notation: "repayment of loan." The remaining $50,000 was not returned to the informant. Petitioner spent the remaining $50,000 on bills and other expenses.

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[1] Most of the meetings and conversations between the informant and petitioner were videotaped and played for the jury. Information about the petitioner's meeting with the third party (and the exchange of $50,000 cash for a check that was deposited in petitioner's account) was not recorded, but petitioner gave a statement to investigators reciting these transactions. Petitioner contended in conversations with law enforcement that he had not laundered any money.

REASONS FOR GRANTING THE WRIT

AN ACT OF MONEY SPENDING, WITHOUT CONCEALING OR DISGUISING THE SOURCE OF MONEY, CANNOT VIOLATE 18 U.S.C. § 1956(a)(3)(B), THE MONEY LAUNDERING STATUTE.

This certiorari petition raises an issue of vital importance to the criminal justice system, which has been a perplexing question for the courts of appeals. This case addresses the extent to which the money laundering statute can be used to prosecute conduct which represents mere money spending without any concealment of the source or origin of funds. The approach taken by the Eleventh Circuit is in derogation of what has been a unified principle of money laundering law among the circuits, thereby causing confusion and uncertainty within the circuits on an important question of law. In view of the rise of money laundering prosecutions throughout the country and the increased use of the money laundering statutes in fraud and economic crime cases, the resolution of the question posed will have considerable consequences to the law enforcement and business communities.

The circuit courts hold fast to the view that spending money is not money laundering within the definition of the federal money laundering statutes. *E.g., United States v. Willey*, 57 F.3d 1374, 1384 (5th Cir.), *cert. denied*, 116 S. Ct. 675 (1995); *United States v. Sanders*, 928 F.2d 940, 945-946 (10th Cir.), *cert. denied*, 502 U.S. 845, 112 S. Ct. 142 (1991). Money laundering has been defined as "the process by which one conceals the existence, illegal source, or illegal application of income, and disguises that

income to make it appear legitimate." President's Commission on Organized Crime, Interim Report to the President and the Attorney General, *The Cash Connection: Organized Crime, Financial Institutions and Money Laundering* 7 (1984), *quoted in Money Laundering*, "Thirteenth Survey of White Collar Crime," 35 Am.Crim.L.Rev. 965 (1998). Consequently, individuals are criminally liable for conducting a monetary transaction only when they act with knowledge or reason to know the funds are derived from unlawful activity. 18 U.S.C. §§ 1956(a), 1957(a).

Section 1956(a)(3) criminalizes three activities resulting from government sting operations. Essentially, a sting operation involves a financial transaction conducted with property represented by law enforcement to be proceeds of specified unlawful activity, or property used to conduct or facilitate the conduct of specified unlawful activity. For purposes of this section, "represented" means "any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section." 18 U.S.C. § 1956(a)(3). Accordingly, § 1956(a)(3)(B) proscribes conducting a financial transaction involving property represented by a law enforcement officer to be the proceeds of a specified unlawful activity with the intent to conceal or disguise the nature, location, source, or control of the proceeds of specified unlawful activity. *See United States v. Knecht*, 55 F.3d 54, 55 (2d Cir. 1995) (upholding money laundering conviction where defendant's only reason for believing illegal source of money to be laundered was statement by undercover agent); *United States v. Starke*, 62 F.3d 1374, 1379 (11th Cir. 1995); *United States v. Barton*, 32

F.3d 61, 64 (4th Cir. 1994) (upholding money laundering conviction when officer showed only flash money, because defendant agreed to launder funds).

The legal distinction between money laundering and money spending centers on the "conceal or disguise" element of the money laundering statute, requiring that the defendant knew "the transaction [was] designed in whole or in part to conceal or disguise the nature, location, the source, the ownership or the control of the proceeds of specified unlawful activity." 18 U.S.C. § 1956(a). *See Ratzlaf v. United States*, 510 U.S. 135, 114 S. Ct. 655 (1994); *United States v. Vasquez*, 53 F.3d 1216 (11th Cir. 1995); *United States v. Waters*, 850 F.Supp. 1550, 1565 (N.D. Ala. 1994). The Fifth Circuit recognized the critical difference between money laundering (a crime) and mere money spending (not a crime), agreeing the distinction is fact dependent on the circumstances of each financial transaction. *United States v. Dobbs*, 63 F.3d 391 (5th Cir. 1995).

The Tenth Circuit agreed that "the heart of the difficulty in applying the money laundering statute is the uncertainty of when spending crime proceeds or conducting some other transaction with those proceeds equates with money laundering." *United States v. Garcia-Emanuel*, 14 F.3d 1469, 1475 (10th Cir. 1994). The clearest example of *legal money spending* is the case of *United States v. Willey*, which controls the legal principle involved in the present case, but was totally ignored by the Eleventh Circuit. *Willey* explains that the receiving and depositing of funds which are *plainly identified* with the defendant do not constitute the necessary concealment for money laundering purposes. Only when a defendant utilizes indicia

of money laundering, such as surreptitious transactions, negotiable instruments which cannot be linked to the defendant, or a fictitious paper trail which covers the defendant's tracks, does money laundering occur. *See United States v. Garcia-Emanuel*, 14 F.3d at 1474. The use of funds openly and with notice is not money laundering. *United States v. Sanders*, 928 F.2d at 944. Application of the money laundering statute to such circumstances "would turn the money laundering statute into a money spending statute." *United States v. Rockelman*, 49 F.3d 418, 422 (8th Cir. 1995).

Notwithstanding that *United States v. Sanders* defines the contours of the money spending issue, the Eleventh Circuit adopted a new rule of inconsistent application, preferring to recognize money laundering even when a person only receives and spends funds which are represented to be illegal proceeds. In the Second, Fourth, Fifth, Eighth, and Tenth Circuits, that same conduct engaged in by petitioner would not violate the money laundering statute. Yet, the Eleventh Circuit inadvisedly brands that conduct as criminal, even though the receiving and spending transactions were not designed to conceal the proceeds of illegal activity. Absent the traditional indicia of money laundering, the money laundering statute should not apply. Yet, the Eleventh Circuit has turned the money laundering laws into a wide net which improperly covers those who merely receive and spend ill gotten money. Congress never intended such a broad reading of the money laundering laws.

Absent a review of the Eleventh Circuit decision, the federal criminal landscape will be irreconcilably altered, resulting in inconsistent applications of the criminal money laundering statutes. One's open association with tainted funds will now suffice to establish a case of money laundering, even though the statute was never intended for so broad an application. *See United States v. Lovett*, 964 F.2d 1029, 1036-1037 (10th Cir.), *cert. denied*, 506 U.S. 857, 113 S. Ct. 169 (1992) ("Defendant's open and conspicuous manner in purchasing [jewelry] undermines any inference that the defendant acted with intent to conceal."). "Merely engaging in a transaction with money whose nature has been concealed through other means is not in itself a crime." *United States v. Dobbs*, 63 F.3d at 398.

By expanding the law of money laundering beyond its natural and proper bounds, the Eleventh Circuit departed from controlling precedent. In the process, the court created irreconcilable conflict with decisions of the other appellate circuits, as presented above. The Eleventh Circuit's reasoning is not supported by legal authority. Moreover, the court's decision to criminalize money spending is contrary to the language of the money laundering statute and the legislative intent. Certiorari is appropriate to address this important question and to resolve the clear conflict created by the Eleventh Circuit opinion. The stakes are high.

CONCLUSION

The conclusion of the Eleventh Circuit threatens fundamental notions of due process and individual liberty. Certiorari review is necessary to answer questions of vital national importance and to resolve irreconcilable conflict among the circuits.

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 97-5793

Non-Argument Calendar

D. C. Docket No. 96-6092-CR-JAG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

AL BAKER LIVINGSTON, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(February 24, 1999)

Before ANDERSON, EDMONDSON and MARCUS, Circuit Judges.

PER CURIAM:

Defendant-Appellant Al Baker Livingston, Jr. appeals his conviction and sentence for conspiring to commit money laundering, in violation of 18 U.S.C. § 1956(h), and money laundering, in violation of 18 U.S.C. § 1956(a)(3)(B). No reversible error has been shown in Defendant's conviction, which we affirm; because the district court committed plain error in failing to consider

application of section 2X1.1 of the sentencing guidelines, we vacate the sentence and remand for resentencing.

Defendant, part owner of a nightclub and restaurant, was approached by a confidential informant ("CI") who claimed that he had "clients" who wanted to purchase Defendant's business to launder illegal drug proceeds. Because Defendant felt it necessary to conceal his acts from his business partner, a plan was devised to first buy out the partner's interest and then to proceed with the money laundering venture. As a first step, the CI gave Defendant $100,000; and Defendant gave the CI two $50,000 post-dated checks drawn on the restaurant's account, made payable to the CI's supposed clients' business: Amerivest. Defendant asked the CI to hold the checks until he could make arrangements to launder the cash.

Defendant did not cover these checks. Instead, Defendant took $50,000 of the cash the CI gave him to a third party, who then issued Defendant a check in exchange for the cash. Defendant deposited this $50,000 check in his personal account.* Defendant repeatedly told the CI not to deposit the restaurant checks. Defendant finally replaced one of those checks with a check drawn on his personal account made payable to a trust fund maintained by the CI, as trustee for his clients. The check

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* Most of the meetings and conversations between the CI and Defendant were videotaped and played for the jury. Information about Defendant's meeting with the third party (and the exchange of $50,000 cash for a check that was deposited in Defendant's account) was not recorded, but Defendant gave a statement to investigators reciting these transactions.

bore a notation: "repayment of loan." The remaining $50,000 was not returned to the CI; Defendant spent this $50,000.

Defendant argues that the government failed to prove an essential element of the crime charged: an intent "to conceal or disguise the nature, location, source, ownership, or control" of the funds. 18 U.S.C. § 1956(a)(3)(B). Openly and conspicuously spending tainted proceeds for personal benefit not designed to create an appearance of legitimate wealth, does not, Defendant argues, satisfy the concealment element of money laundering. Citing circuit court decisions that have held that money spending, without more, is not money laundering within the definition of the federal money laundering statute, *see, e.g., United States v. Dobbs*, 63 F.3d 391, 397-98 (5th Cir. 1995); *United States v. Sanders*, 928 F.2d 945-46 (10th Cir. 1991), Defendant maintains that all the government proved is that he received and spent funds represented to be illegal drug proceeds.

Defendant ignores the financial transaction whereby he converted $50,000 of the funds transferred to him by the CI into a check. That check, according to Defendant's statement to investigators the day after his arrest, was deposited into his personal checking account. Thereafter, Defendant delivered his personal check to the CI for $50,000, made payable to the "George Allen Trust Fund." The Defendant wrote "repayment of loan" on the check, although nowhere in all the videotaped discussions with the CI was the suggestion made that the money exchanged was a "loan." This evidence, viewed "in the

light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor, *United States v. Lyons*, 53 F.3d 1198, 1200 (11th Cir. 1995), was sufficient for a reasonable trier of fact to find that Defendant sought to "conceal or disguise" within the meaning of the money laundering statute.

We have reviewed Defendant's other claims of trial error and conclude no reversible error has been shown.

For purposes of sentencing, Defendant argues that the district court incorrectly computed the value of the funds laundered when it determined he had laundered $300,000. The $300,000 represented the amount of money the Defendant and the CI discussed laundering so that Defendant could buy-out his partner who, Defendant believed, would be a thorn in the proposed money laundering venture. At most, Defendant argues, the value of the funds laundered for sentencing purposes cannot exceed the $100,000 transferred from the CI to Defendant.

Defendant was sentenced based on an offense level of 27. The base offense level of the underlying crime was 20. *See* U.S.S.G. § 2S1.1 To this base, five levels were added for knowledge of unlawful drug activity and role in the offense, yielding an offense level of 25. Because the district court found that the value of the funds laundered was $300,000, an additional two level enhancement was applied under section 2S1.1(b)(2).

Defendant, citing *United States v. Khawaja*, 118 F.3d 1454 (11th Cir. 1997), contends that the district court erred in not applying section 2X1.1 of the guidelines to reduce the offense by three levels. In *Khawaja*, 118 F.3d at

1459, we held it was plain error for the sentencing court not to apply, section 2X1.1 to determine the offense level when the defendants had been convicted of money laundering and conspiracy to commit money laundering.

Section 2X1.1(b)(2) provides for a three-level reduction

> unless the defendant or a co-conspirator completed all the acts the conspirators believed necessary on their part for the successful completion of the substantive offense or the circumstances demonstrate that the conspirators were about to complete all such acts but for apprehension or interruption by some similar event beyond their control.

The commentary to section 2X1.1 provides that where the participants have completed all of the acts necessary to the successful completion of a part – but not all – of the intended offense, the offense level is the greater of (i) the offense level for the intended offense minus three levels, or (ii) the offense level for the part of the offense completed. U.S.S.G. § 2X1.1 comment. (n.4).

Applying section 2X1.1, a three-level reduction is mandated unless the defendant had substantially completed all the acts necessary for laundering $300,000 of drug proceeds. This reduction would result in an offense level of 24 (27 minus 3). The offense level for laundering $100,000 or less – the part that was actually completed – is 25. See § 2X1.1(b)(2)(A). Thus, under the commentary and *Khawaja*, 25 (the greater of 24 and 25) should have been the offense level unless all of the necessary acts were completed with respect to the laundering of the $300,000 or the circumstances demonstrate that all such

acts were about to be completed but for Defendant's arrest.

The district court plainly erred in failing to apply section 2X1.1 Because application of this guideline could result in a lower sentence, we vacate and remand to the district court for further findings on whether Defendant and his co-conspirators had completed all acts believed necessary on their part to complete the laundering of the entire $300,000.

AFFIRMED, in part; VACATED in part; REMANDED for resentencing.